78-1649

Supreme Court, U. S.
FILED
APR 19 1979
MICHAEL RODAK, JR., CLERK

~~NO. 78-1988~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Plaintiff-Respondent

v.

RICHARD FRANKLIN FLEENER,
Defendant-Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Richard Franklin Fleener, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. No opinion was rendered by the District Court. Copies

of the opinion of the Court of Appeals for the Ninth Circuit and the judgment of the District Court are attached as Appendices.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1979. A timely filed petition for rehearing and petition for rehearing en banc was denied on March 9, 1979, and this petition for certiorari is timely filed. Jurisdiction is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Is the evidence sufficient to support a conviction of an offense defined by the Hobbs Act?

2. Is the evidence sufficient to show that commerce has been obstructed, delayed, or affected?

3. Did the District Court abuse its discretion in permitting incoherent, inaudible, and partial tapes to be played, interpreted, and used throughout the trial?

(a) Were the unintelligible and inaudible portions of tapes admitted as evidence so substantial as to render the recordings as a whole untrustworthy, thereby denying appellant due process of law?

(b) Was a sufficient predicate or foundation for the admission of the tape recordings established?

4. Did the failure of the Trial Court to require that a record be made of the portions of the tapes played in open court and three bench conferences deny the defendant adequate appellate review and effective assistance of counsel on appeal?

5. Was the defendant convicted of an offense not charged in the indictment, on the basis of evidence extraneous to the indictment?

6. Is the indictment upon which the conviction is based duplicitous?

STATUTE INVOLVED

The statute involved is 18 U.S.C., § 1951, popularly known as the Hobbs Act, which provides as follows:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion, or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United states; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793.

STATEMENT OF THE CASE

Defendant-Petitioner Richard Franklin Fleener, a Clark County, Nevada, Deputy Tax Assessor, was charged by one count indictment with the violation of interference with commerce by extortion under 18 U.S.C., § 1951. It was alleged in the indictment that he demanded and solicited money and property from D'Jamshid Mahban, a Las Vegas rug merchant, to prevent loss due to increased and manipulated personal property tax assessments. He was tried before a jury in the United States District Court, District of Nevada, on his plea of not guilty, in Cause number Criminal-LV77-141, RDF-(DWW). The jury returned a verdict of guilty on March 15, 1978. He was sentenced in Los Angeles, California, on April 17, 1978. The court assessed punishment at a period of three years in the custody of the Attorney General. His appeal to the Ninth Circuit resulted in the opinion rendered on January 19, 1979.

Since the questions presented in this application directly involve the sufficiency of evidence, and various procedural

and evidentiary rulings, further discussion of the facts is set forth in conjunction with the specific contentions of error.

ARGUMENT

1. The Evidence Is Insufficient To Support A Conviction Of An Offense Defined By The Hobbs Act.

The indictment charges extortion in that Mr. Fleener (1) attempted to obtain money and property and (2) did obtain approximately $500, *induced under the color of official right* by demanding and soliciting from Mahban $500 which was paid (a) *to lower the property tax assessment of Mahban,* and (b) *to prevent economic loss to Mahban due to increased and manipulated personal property tax assessments* in violation of § 1951 *Title 18, U.S.C.* (the Hobbs Act.)

The Hobbs Act proscribes robbery or extortion, or attempts or conspiracies to rob or extort which in any way or degree obstructs, delays, or affects commerce. Extortion is defined as the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. Analyzing the indictment in light of the statute, it charges that Mr. Fleener, under color of official right,[1] (1) attempted to obtain money and

1. The Government's theory of its proof was contrary to the allegations of the indictment. At Page 229 of the Reporter's transcript of proceedings, the attorney for the Government stated: "The gist of the extortion was the obtaining of money and property under color of official right, *or induced by fear of economic harm.*" As the attorney for the Government noted (Rec. Vol. 1, p. 229), this theory was put forth before the jury in the opening statement. It was likewise argued in the Government's opening and closing arguments, and the court charged on both theories of extortion. (Rec. Vol. 2,

property and (2) did obtain $500.[2] The specification of the wrongful actions taken "under the color of official right" injects an element of confusion and vagueness into the indictment. Part (a) above, is readily understood, for it accuses Mr. Fleener, in language that is comprehensible, of soliciting money to lower Mahban's property tax assessment. Part (b) is incomprehensible. There is simply no way to determine, from the wording of the indictment, what is meant by the allegation that $500 was paid "to prevent economic loss . . . due to increased and manipulated personal property tax assessments." The key to the meaning intended is to be found in a discussion occurring during the presentation of Motion for Acquittal after conclusion of the Government's case. Defendant's counsel argued that the Government had shown no evidence of threats, compulsion, or duress. The court interrupted (Rec. Vol. 1, p. 226), and ventured the opinion that the Government's theory was

> that the design on the part of the defendant was to put the fear in Alex [Djamshid Mahban] that if he didn't go along and pay the money, that this man, under color of authority, had the right to go high and above what the merchant thought his inventory was worth, or valued at, and that he, the merchant, would end up with a much higher tax bill. . . .

Defendant's attorney responded that this was being heard for the first time, and that the Government contended

p. 430). However, it is clear that the indictment covers only extortion "induced under the color of official right." This variance in the indictment, proof, and charge to the jury is the subject of a separate point of error.

2. The fact that the one count indictment is duplicitous in that it charges both attempt and actual extortion is also the subject of a separate point of error.

that Fleener was charged "with the idea that 'I'll lower your taxes if you'll pay me money, that we will reduce your taxes.'" (Rec. Vol. 1, p. 227-28) The Government then asserted that the gist of the extortion was obtaining money under color of official right, *or* induced by fear of economic harm (i.e. by duress). It was contended that the two theories were alleged in the alternative in the indictment (which clearly is not the case). The Government then stated that Mr. Fleener had the power to do certain things, "one of which was to assure the continued financial successful operation of an interstate business, namely, by adjusting, up or down as the case may be, the tax assessment."[3] This, then provides the key to understanding part (b). whereas part (a) accuses Fleener of offering, for money, to adjust, improperly, the property tax assessment *downward*, part (b) accuses Fleener of offering, for money, to prevent economic loss by refraining from adjusting the personal property tax assessment *upward*.[4]

The Government's scenario is that on November 17, 1977, after a call from a "friend" Mahban was visited by Mr. Fleener. The conversation that ensued during this

3. The second (and only other) thing the Government contended Mr. Fleener represented he had the power to do was "having a direct impact or influence on the federal tax assessment." This clearly is beyond the scope of the indictment, which refers only to money being paid to lower the *property tax assessment*, and to prevent economic loss due to increased and manipulated *personal property tax assessments*. It is not even arguable that these references comprehend federal tax assessments.

4. This reference to the Government's declared theory does not cure the vagueness in the indictment, (a condition exemplified by the apparent confusion of the court, defendant's counsel, and Government's counsel over the nature of the charges) but serves to define the extent of the charges possibly included in the indictment in order to test the evidence supporting the conviction.

first visit caused Mahban concern, so he consulted an attorney who advised him to attend a proposed second meeting with Mr. Fleener, and equipped him with a tape recorder. The second meeting was held on November 18th and, with the concealed tape recorder on his person, Mahban purportedly recorded approximately one-half of the conversation. During a visit to Los Angeles on November 19th, Mahban reportedly was advised by the husband of the girlfriend of his girlfriend to contact the F.B.I., which he did on his return to Las Vegas. The F.B.I. outfitted Mahban with another recorder and a transmitter, and marked three $100 bills to be used as "bait money". A third meeting was then held with Mr. Fleener on November 21, 1977, under the surveillance of the F.B.I., who monitored the conversation through the transmitter and hand-held walkie-talkies. A recording of this conversation was obtained, through the concealed tape recorder. Mr. Fleener was arrested by the F.B.I. agents immediately after the completion of the conversation with Mahban, and was found to be in possession of the three marked $100 bills.

The Government elicited evidence from a total of nine witnesses. Four of these—T'Kindt, Smith, Scobie and Parker—were F.B.I. agents. The agents testified only as to the contact by Mahban, and the mechanics of wiring Mahban for sound, the surveillance, and the arrest of Fleener. None of them gave any evidence relating to substantive elements of the alleged offense.[5]

5. Agent T'Kindt testified that he made transcripts from the tapes made during the meeting of November 18th (before the F.B.I. was contacted) and November 21st (after the F.B.I. was contacted), and these were offered by the Government (Rec. Vol. 1, p. 43), but the court found the transcripts to be unreliable and refused to admit them in evidence. (Rec. Vol. 1, p. 88-89).

The witness Ricardo was a deputy assessor who accompanied Fleener to Mahban's place of business on November 21, 1977. He was not present during any conversation between Mr. Fleener and Mahban, and gave no evidence relating to the offense. Terry Leavitt was an associate in the office of Mahban's attorney, and testified about Mahban's being outfitted with a tape recorder after Mr. Fleener's visit on November 17, 1977. He gave no testimony relating to the offense.[6] The witness Jean Dutton, Clark County Tax Assessor, simply identified Mr. Fleener, and others, as employees of the Tax Assessor's office, and the witness Killingsworth was introduced and identified, but did not give evidence on any subject.

Therefore, the only evidence upon which the Government can rely to sustain the conviction is the testimony of Mahban.[7]

Mahban testified that he is known as Alexander, that he has several businesses in town (Las Vegas), that he is

6. Leavitt was permitted, over objection, to testify that Mahban had stated he had been approached by a member of the assessor's office and asked for a sum of money "for the purpose of doctoring some documents." The court characterized this as "admissible hearsay." (Rec. Vol. 1, p. 184) Since it is hearsay, it can not constitute evidence of an offense. Further, the phrase "doctoring some documents" has no meaning and could not evidence an offense even if admissible.

7. Petitioner has not overlooked the fact that the tapes purportedly made during the conversations of November 18th and 21st were played to the jury and admitted into evidence. The tapes were demonstrated to be totally unreliable, a situation aggravated by the improper handling of the tapes which accorded them undue emphasis and stature as evidence which they did not possess, which is discussed in detail, *infra*. However, as reflected by the unadmitted transcripts of the tapes, embodying the prosecution's version of what was said, it is clear that the tapes, even if properly considered, add nothing to the testimony of Mahban (who was allowed to interrupt the tapes and "explain" the discussion, at will).

an importer of Oriental and Persian rugs, tapestries, and other kinds of gift items, that he has several stores including Grand Persian in the MGM Hotel, Grand Carpet at the MGM Hotel, House of Oriental Rugs, Las Vegas Blvd. South, Carpet Capital, Las Vegas Blvd. South, Tehran Gallery on Regal Street, and Nevada Carpet Company, Ltd., on Maryland Parkway.[8] He said he received a call on the 17th from a friend, who said that Mr. Fleener wanted to see Mahban regarding his inventory tax—"an I.R.S. agent". (Rec. Vol. 1, p. 55-56) Later, Mr. Fleener visited Mahban at the MGM Hotel. According to Mahban, Fleener wanted to go through his "inventory tax papers". Mahban said Fleener told him the I.R.S. was investigating him, but if Mahban cooperated, Fleener would "fix my papers to be correct for I.R.S."[9] When asked to explain what was meant by "fix" the papers, Mahban responded "my inventory shows to I.R.S. differently than county assessor's." (Rec. Vol. 1, p. 58) Mahban said Fleener "said if I help him, he's helping me. And only one way I understood, to pay him some money, or something." (Rec. Vol. 1, p. 59) Fleener mentioned "cash and rugs", "but not any amount or anything at all," according to Mahban. (Rec. Vol. 1, p. 59) Fleener had with him tax declaration papers which "he told me I send this paper in to him and it's not correct," (Rec. Vol. 1, p. 61) meaning that Fleener did not believe the inventory shown on the paper to be correct. (Rec. Vol. 1, p. 61) The conversation on the 17th was very short, because Mahban had another appointment, and wanted

8. Further discussion of Mahban's business activities is contained in the discussion relating to the failure to prove involvement of interstate commerce.

9. It is to be remembered that all testimony relating to the I.R.S. is wholly extraneous to the indictment.

to go to his attorney to "see what was going on." (Rec. Vol. 1, p. 58). He then went to see his attorney. (Rec. Vol. 1, p. 60) He related to the attorney that Mr. Fleener told him something was wrong with his tax paper and that Fleener wanted him (Mahban) to help him (Fleener). The attorney asked what Mahban understood by "help" and Mahban said "I think he wanted some cash and rugs." The attorney suggested a tape recorder (Rec. Vol. 1, p. 62), which was obtained. (Rec. Vol. 1, p. 63-64).

The tape recorder was used the following day (the 18th), but only recorded about one-half of an hour-long conversation. (Rec. Vol. 1, p. 65) Mahban related that on the 18th, Fleener brought up the problem with the I.R.S., and then recalled that on the 17th, as well as on the 18th, Fleener purportedly indicated that the Government knew that Mahban was involved in "smoking or selling narcotics or dope" and that was why, on the 17th, Mahban "was scared to go to attorney right away because he indicate the Government know I am involved with something." (Rec. Vol. 1, p. 66)

Mahban then related that on the 18th this conversation occurred:

> If I pay him a thousand dollars and some wall to wall carpet, install it for his boss's home, like he fix my inventory tax return, and he make it so like I.R.S. should not come after me again.[10]

10. This is as close as Mahban comes to suggesting wrongdoing. But it is clear that "fix my inventory tax return" can not be gratuitously construed to mean improper lowering or raising the tax assessment. The very context in which the statement was made suggests the contrary, i.e., a reconciliation of conflicting inventories reported by Mahban to different taxing authorities. This was a valuable, and entirely proper, service to Mahban.

Mahban paid Mr. Fleener $200 on the 18th. (Rec. Vol. 1, p. 67).

After this conversation, Mahban was advised to contact the F.B.I., which he did. (Rec. Vol. 1, p. 68-69) He told the F.B.I. Fleener was accusing him of "tax fraud." (Rec. Vol. 1, p. 70). The F.B.I. outfitted Mahban with a tape recorder, and Mahban arranged to meet Mr. Fleener at 2:00 o'clock p.m. on the 21st. (Rec. Vol. 1, p. 70) Mr. Fleener showed him some papers "like he brought my inventory tax paper, and how he did fix it.[11] And I should pay him the rest of the money. I paid him $300 in hundred dollar bills." Mr. Fleener also "showed me a piece of paper like his boss had been to my shop and chose the carpet he wanted." (Rec. Vol. 1, p. 71).

Mr. Fleener left Mahban a copy of the papers he prepared, and a small piece of paper bearing the name of Ronnow identified as the person to whom carpet should be delivered. (Rec. Vol. 1, p. 73) Mahban stated Fleener did not offer to pay for the carpet, "I have to pay him for the favor he make for me." (Rec. Vol. 1, p. 73).

The Government played the two tape recordings and periodically interrupted to ask Mahban questions. There is little of significance in Mahban's explanation of the tapes (in fact, the result is more confusion than clarification). At one point during the playing of the first tape, Mahban said that he was "making a question like what Mr. Fleener give to I.R.S. is they accepting his report, you see, he is supposed to make a report to I.R.S." (Rec. Vol. 1, p. 78) At another point, Mahban said

11. The record is devoid of proof that the documents prepared by Mr. Fleener reflected improper inventory figures, or even lowered Mahban's taxes. In fact, the evidence is to the contrary, i.e., the inventories were increased with the effect of raising the taxes.

that he was asking Fleener what he wanted "for all this favor he make for me. And he said—I believe we came to the carpet, he wants a hundred yards of carpet, I don't know." (Rec. Vol. 1, p. 79) At another point, Mahban was questioned about a reference to "Mr. Ripper" and replied "Mr. Fleener told me, like the money has to go to a Mr. Ripper, one of the I.R.S. agents." (Rec. Vol. 1, p. 79) References to the first tape were concluded by Mr. Mahban explaining that a portion of the tape said: "We ask with, I ask him how much. He said 'one'. I says 'one thousand'? He says yes, five hundred for him, five hundred for I.R.S. is a thousand." (Rec. Vol. 1, p. 81). There was no testimony as to the purpose or nature of the payment.

In the explanation of the second tape, Mahban stated: "I believe I had to pay $2,800 taxes and I was asking Mr. Fleener what he saved me, and the money he wants from me, because if I pay $1,400, if my tax is $2,800, if he reduce it to $1,400, if I pay him $1,400 plus paying him a thousand dollars plus I pay him $700, you go over what I have to pay the Government." Mahban at this point was asked the meaning of a reference to the I.R.S., and replied "Because he has to report it to I.R.S. all the time." (Rec. Vol. 1, p. 87) When asked why this was a concern to him, Mahban stated, "I don't know, he was telling me about it, you know, I ask him what he is reporting to I.R.S." (Rec. Vol. 1, p. 88)[12] Later during the second tape, Mahban said, "That of making conversation, like, okay, what is my insurance if I pay the

12. It was at this point in the proceedings that the court made its ruling concerning the admissibility of the transcripts, and announced that ruling to the jury, during which he expressed further reservations both about the transcripts and the tapes.

money he shouldn't come back to me six months after to get more money from me. And he says no, he's not doing that, and the thousand dollars is what I have to pay, he should fix my paper, plus the carpet." (Rec. Vol. 1, p. 91) On the same subject, Mahban stated, "I was telling him if I paid the money what was my guarantee like I.R.S. not coming back to me and charging me with something, or getting more money from me. We was talking about I.R.S." When asked Fleener's response, Mahban stated: "I believe—I couldn't hear the tape myself, like he said no, they are not coming to me, he make sure he's not coming back to me." (Rec. Vol. 1, p. 92).

Mahban also said, "I believe we are discussing if I did not pay him and I.R.S., charge me with—what could they charge me with, and he told me with fraud." (Rec. Vol. 1, p. 95) In the concluding parts in the tape, Mahban stated that Fleener gave me "the piece of paper" and asked what was "happening to the other five hundred dollars." (Rec. Vol. 1, p. 95) Fleener also gave Mahban a tax form and "I ask him what shall I do with this paper. He said I should keep it just from, up to one declaration for '77 and the rest is from, up till 1978. June 1978." (Rec. Vol. 1, p. 96).

Following the conclusion of the tapes, Mahban stated that he was planning to open a new business, and discussed it with Fleener, and that Fleener gave him information about how to keep inventory—"like he was mentioning in the warehouse. As we know, in Nevada, if you keep it in the warehouse, it's not taxable, okay? And he told me in the future, because he did not know himself in what stage of business we are in. And he is

going through what tax we have to pay for this business." Mahban further stated: "I did not understand, like Mr. Fleener asked me in the meeting how much merchandise we want to carry. I told him a million. And he says it's a hundred seventy-five thousand tax, inventory tax. I believe I corrected him, it's only seventeen thousand five hundred." Mahban stated that if he had had to pay a $175,000 tax in advance he couldn't open the business. When asked what he thought would happen if he didn't agree to have Fleener help him, Mahban stated "we have to take full taxes" but that he didn't know what those would be because he did not have the inventory. (Rec. Vol. 1, p. 113).

Mahban testified Fleener said that he was going to help him next year and that meant "fixing my tax", but he (Mahban) did not know what he would have to do because "we did not know what's going on next year, no." (Rec. Vol. 1, p. 116).

The Government's concluding question, on direct examination, asked Mr. Mahban what he understood that Fleener was going to do for him regarding the Internal Revenue Service. Mahban's answer does nothing to eliminate the confusion arising from his previous answers:

> Well, he told me about the agent, and I already got a call from Internal—from the tax people, and I was under auditing about two years, they were going through my papers anyway. And when Mr. Fleener told me, I did not know what was going on, I have from one side some other people calling me from this side telling me about the taxes, and I was confused this time about the taxes. I thought, naturally he knew these people, because he know exactly what

I declared last year for 1976, and he know my tax record. I did not know how he got my tax record, what, how do you find out about my tax return papers? But he knew it. So I thought he was working with them.

On cross-examination, Mahban stated that he did not know what the county assessor has to do with federal taxes, that he has filed personal property declarations with the county assessor every year for six years, and that bookkeepers were employed for this purpose, that he had many times discussed with his bookkeeper what was necessary for a personal property declaration, and he therefore fully understood Mr. Fleener's mission when Mr. Fleener started to talk to him about his personal property declarations. (Rec. Vol. 1, p. 118-121) He talked to Mr. Jenkins, his bookkeeper, and learned that Mr. Fleener had visited the bookkeeper (Rec. Vol. 1, p. 125-126); Mahban made inquiry of Jenkins whether the personal property declaration that had been filed was correct. Jenkins told Mahban that the declaration was made. When Mahban told Jenkins there was some problem with the tax papers, Jenkins stated that Mahban should cooperate with Mr. Fleener. (Rec. Vol. 1, p. 128) It was also developed during cross-examination that there were reasons to question the inventory figures, because Mahban had reported both a fire loss and theft loss affecting inventory. (Rec. Vol. 1, p. 130-131) Mr. Mahban admitted that he had told Fred Sadri that Mr. Fleener was a nice man and that he could have told Mr. Sadri that Fleener was going to help him (Mahban) organize his clothing business. (Rec. Vol. 1, p. 144-145) Mahban further admitted that Fleener "gave him advice" with regard to Mahban's proposed business in which there

would be a million dollar investment. (Rec. Vol. 1, p. 147)[13]

Of considerable significance was testimony elicited during cross concerning personal property tax declarations filed by Mahban for the fiscal year July 1, 1977 to June 30, 1978, identified as Defense Exhibit A. Mahban stated that his manager prepared them, that he signed them, and that they were filed at his instance. These were compared to Govt's Ex. 10, which consisted of the documents that Mahban testified Mr. Fleener gave him on the 21st day of November, 1977. These are the only documents relating to Mahban with which Mr. Fleener is shown to have had any connection. Mahban stated that the records comprising Govt's Ex. 10 reflected compilation of his inventory, in the stores indicated, prepared by Fleener, *and that the inventory figures represented a combination of information secured by Mr. Fleener from Mr. Jenkins, and "physical inventory he has been and seen."* (Rec. Vol. 1, p. 170) Not only does this testimony establish the authenticity of inventory figures included in the property tax declarations purportedly prepared by Fleener (and thereby conclusively rebuts the Government's basic theory of threatened or actual fraudulent alteration of the tax base), but the documents indicate that Fleener actually raised the inventory figures, thereby increasing the tax.

The foregoing does not purport to be a complete resumé, but every effort has been made to cite all testimony from which an inference of wrongdoing could be

13. The importance of this testimony is that it serves as corroboration of Mr. Fleener's testimony to the effect that he was hired as a consultant by Mr. Mahban and rendered him valuable advice concerning tax matters, which was entirely legitimate and proper, and for which he was paid.

drawn, in proper context. It is clear that the Government has totally failed to support the charges against Mr. Fleener.

In determining whether there is evidence sufficient to sustain a conviction, the appropriate test, as a general proposition, is whether reasonable minds could find evidence that excludes every reasonable hypothesis but that of guilt, and in considering that question, the Court of Appeals must review the evidence taking into account the reasonable inferences which may be drawn from it in the light most favorable to the Government. *Thomas v. United States,* 369 F.2d 372 (9th Cir. 1966).

Testing the evidence against the indictment, the Government proved (1) that Mr. Fleener was a Clark County, Nevada deputy tax assessor and, to the extent that he had anything to do with the personal property taxes of Mahban, acted "under the color of official right"; and that (2) Mr. Fleener did obtain approximately $500 from Mahban and "attempted" to obtain an additional $500 and certain carpeting. The proof fails, however, when it comes to the gist of the offense alleged in the indictment. There is no evidence that the $500 paid, or the $500 and carpeting promised, was "to lower the property tax assessment of Djamshid Mahban." There were references to "fixing" the inventory tax return. There is a reference to money to be saved by Mahban. There are also references which, in the manner of presentation by the Government, leave a vague impression that something improper might have been discussed or suggested. The record is devoid, however, of evidence of actual impropriety. There is no proof of any specific wrong that purportedly was to be committed by Mr. Fleener. There is no evidence that Mr. Fleener either offered to, or did

in fact, improperly lower the property tax assessment of Mahban. The only record evidence is to the contrary, i.e., to the effect that Fleener prepared inventory assessments based upon the information obtained by personal inspection and from Mahban's bookkeeper, Jenkins, the effect of which was to *raise* Mahban's taxes. There likewise is no evidence that Fleener in any way indicated that if he was not paid, Mahban's personal property tax assessment would be "increased and manipulated."

The only definite conclusions that can be drawn are that there were questions about Mahban's inventory declarations, and those declarations were in conflict with inventories shown on Mahban's income tax returns. Mr. Fleener offered to, and apparently did, effectuate a reconciliation and remedied the deficiencies. To accomplish this, he used inventory information gained from Mahban's bookkeeper, and actual inspection. The accuracy of that information has not been attacked. It is clear that reasonable minds could not find evidence that excludes every reasonable hypothesis but that of guilt. Though the evidence may support an inference of impropriety, the inference cannot give definition to the impropriety, for this would amount to creation of evidence by inference or "stacking an inference on an inference." There is no evidence that Mr. Fleener offered to do any specific illegal, improper or fraudulent act, and no evidence from which any inference of specific improper, illegal, or fraudulent action can be drawn. In this regard, attempts to draw inferences should be closely scrutinized, for the Government, having wired Mr. Mahban for sound, and instructed him in the use of bait money, and having monitored one of the conversations with Mr. Fleener, should not now be allowed to "infer" Mr. Fleener into prison.

2. The Evidence Is Insufficient To Show That Commerce Has Been Obstructed, Delayed Or Affected.

Mahban operated the Grand Persian Store in the MGM Hotel, the Grand Carpet Store at the MGM Hotel, the House of Oriental Rugs, Las Vegas Blvd., Carpet Capital, Las Vegas Blvd. South, Tehran Gallery on Regal Street, and Nevada Carpet Company, Ltd. on Maryland Parkway. (Rec. Vol. 1, p. 52-53) "Almost" all his merchandise is imported from overseas or out of the state, and sold in the ordinary course of business to local residents, tourists or other merchants from other states. (Rec. Vol. 1, p. 53-54) The services of a shipping company are used to pack, insure and mail goods sold to out-of-state residents. (Rec. Vol. 1, p. 54) Mahban also started a new business called "Vogue Fashions" which was going to carry a million dollar's starting inventory. (Rec. Vol. 1, p. 85) Mr. Fleener informed Mr. Mahban that if his inventory was kept in a warehouse, and sold outside the state, it was not taxable (for "inventory" tax purposes). (Rec. Vol. 1, p. 86) Mahban made reference to "the machinery in my factory". Presumably this referred to machinery in a garment factory either in operation or preparing to go into operation, to make dresses for Vogue Fashions, but the reference is not clear, and it could refer to an entirely different factory. (Rec. Vol. 1, p. 92)

Mahban at first stated that the carpet to be furnished to Mr. Ronnow would have to be obtained from out of state, but, on cross-examination, stated that he did not know whether the carpet selected was already in a local store or warehouse.

Mahban testified that Vogue Fashions was going to locally manufacture and also import women's clothing from different countries. (Rec. Vol. 1, p. 110-111) The $500 paid to Fleener was taken from money at his office at the MGM Hotel, but he did not identify the source of the funds other than from "his business."

Mahban testified that no interstate shipments were delayed by reason of his conversation with Mr. Fleener.

This, essentially, constitutes the proof relating to interstate commerce.

The Hobbs Act requires a showing that commerce, or the movement of an article or commodity in commerce, is in some way or degree obstructed, delayed, or affected. Title 15, U.S.C. Sec. 1951(a). *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972), reaffirmed that "all of the Hobbs Act cases agree that the court should determine whether the facts alleged meet the statutory requirement of affecting interstate commerce." 448 F.2d at 839. It has been held that in order to satisfy the statute, the effect on interstate commerce need only to be a minimal degree. *United States v. Schackelford*, 494 F.2d 67 (9th Cir. 1974); *United States v. Addonizio*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936, (1972). In *United States v. Hyde*, it was observed that a different standard is employed under the Hobbs Act than under the Sherman Act, although Congress, in enacting both acts, exercised its full power under the commerce clause, Art. 1, Sec. 8, Cl. 3, Federal Const. The outer limits of liberality accorded the proof of commerce involvement under the Hobbs Act are defined in language held to be a proper charge in *United States v.*

Provenzano, 334 F.2d 678, 692-693 (3d Cir. 1964), quoted in *United States v. Addonizio, supra:*

> "Where the resources of a business are depleted or diminished in any manner or degree by payments of money obtained by extortion the capacity to efficiently conduct such business is to the extent of the drain on its resources likely to be impaired. . . . It is merely required by the law where extortion is shown that it did in some way or degree obstruct, delay, or affect commerce. . . . It is the depletion of the resources of a business by extortion which permits as a reasonable inference if the extortion is established that its operations are delayed, obstructed, and affected."

In the present case, the alleged extortion involves local property taxation. The incidence of the tax which is the subject of the indictment must necessarily be upon property at rest, within the state of Nevada, held for local sale. If the property were in transit, or had not completed its interstate shipment, or was committed to future interstate shipment, it would be beyond the power of a local unit of state government to impose a tax upon it. See *Independent Warehouses, Inc. v. Scheele,* 67 S.Ct. 1062 (1947), discussing the power of taxation under the commerce clause.

This proposition is expressly recognized by a principle of Nevada taxation law which prohibits assessment of the tax in question upon property held in a warehouse for interstate sale and distribution. Mahban evidenced thorough familiarity with this principle.

Accordingly, the extortion which the indictment alleges is a purely local, or intrastate, activity. It necessarily

had reference to property at rest within the State of Nevada, after completion of any interstate shipment, held for local sale, and prior to any interstate shipment that might result after completion of a local sale. Obviously, therefore, the alleged extortion did not directly involve the flow of interstate commerce, nor could its incidence be said to directly relate to the movement of any commodity in interstate commerce.

Accordingly, therefore, if jurisdiction is to be sustained, it must necessarily be on the basis of the principle recognized in *Addonizio, supra,* that the depletion or diminution of the resources of an interstate business permits as a reasonable inference, if the extortion is established, that interstate operations are delayed, obstructed, or affected. The crucial element is proof of depletion or diminution of resources which the business would have used in interstate commerce.[14] The Government wholly failed to sustain this burden.

The scope of the actual extortion alleged in the indictment is $500, which, according to Mahban, was taken from funds on hand at his office in the MGM Hotel and originated from "his business." However, he did not define which of his businesses produced the funds, whether the funds were produced by sales of merchandise originally purchased in Nevada, or elsewhere, whe-

14. Although every case which has upheld interstate commerce jurisdiction under the Hobbs Act has found some degree of actual obstruction or depletion of assets used in interstate commerce, no case has placed any minimum threshold requirement or standard on the amount of depletion or diminution of resources necessary to establish effect on commerce. Though it may appear ridiculous, under the "de minimus" test, the depletion of as little as one dollar, or one penny, in resources used in interstate commerce might be sufficient. Fortunately, it is not necessary to resolve this point in the present case.

ther the funds constituted resources of any particular business, or whether such had previously been withdrawn in the form of profits, dividends, salary, or "petty cash", etc.

The cases are uniform that some actual effect upon commerce must be shown. Here the Government totally failed to prove that the extortion or attempted extortion alleged in the indictment depleted or diminished resources used, or which would have been used, in interstate commerce, or in any way or in any degree affected, obstructed, or delayed Mahban, or any of his businesses, in the conduct of any interstate activities. The only evidence in the record is to the contrary. Mahban testified to the effect that his conversations with Fleener in no way delayed or obstructed any interstate shipment.

It is required that one of the "natural effects" of an extortion under the Hobbs Act be an obstruction of interstate commerce. *Nick v. United States,* 122 F.2d 660 (8th Cir.), *cert.* denied, 314 U.S. 687 (1941). It certainly cannot be said that the "natural effect" of an extortion is to drain resources used in interstate commerce, where the "natural effect" of the extortion alleged in this indictment is a net savings to the business.

Of course, the Government will likely respond that the "prevent economic loss" portion of the indictment refers to a threat to manipulate tax assessments that caused Mr. Mahban to pay more than legitimately due. However, there is not even a suggestion in the record that Mr. Mahban would ever be required, under any set of circumstances, to pay more than the amount legitimately owed or, as Mahban described it, the "full taxes" due. Therefore, the term "prevent economic loss" viewed in

light of the record, could only refer to a savings to Mahban.

In *United States v. Starks,* 515 F.2d 112 (3rd Cir. 1975), proof of interstate commerce was challenged.

> "There was evidence of a decline of resales during the period of the alleged conspiracy, but no evidence of declines of purchases. We conclude, however, that although this part of the Government's case was extremely thin, it met the federal jurisdiction test for a Hobbs Act violation."

In the present case, the evidence was not thin, it was nonexistent. There was no evidence of decline of either sales or purchases, and no evidence of any lessening in the ability to continue interstate activities.

The case of *United States v. Merolla,* 523 F.2d 51 (2d Cir. 1975), establishes that something more than lip service must be accorded the interstate commerce element. There a contractor, constructing a building to be used as an automobile dealership, complained of extortion by the owner. The contractor, Goberman, proved that he purchased materials from out of state which were delivered to the job site to be used in the building process, and that new automobiles which the owner, McNamara, sold at the completed showroom were assembled in other states and transported into New York. The court observed that this was Goberman's first and only construction venture, and that "all necessary material for the project had already been delivered to the site by June 5—the date of appellant's first extorted property from Goberman. Thus, there is no reason to believe that Goberman would have purchased goods in interstate commerce for the showroom project or any

other construction project had his buying power not been diminished." The court also observed that any effect on the construction or on the arrival of the new cars operated on McNamara, the defendant, who was in position to fully determine whether to engage in interstate commerce by selling cars or not. "We do not see how he could be subject to prosecution under this statute for restraining or affecting his own commerce where he has the right to lawfully choose to cease construction or abandon the business of selling automobiles." The court concluded that the victim's purchase of interstate goods must be of a continuing nature or the relationship between the extortion and any interstate commerce becomes merely conjectural.

Here any relationship between an extortion in conjunction with local property taxation, and any on-going "interstate" business of Mahban is purely conjectural. When the lack of proof of lessening of buying power, or depletion of resources, is considered, it conclusively appears that the relationship is non-existent.

3. The Trial Court Abused Its Discretion In Permitting, Without Proper Foundation Or Predicate, Incoherent, Inaudible And Partial Tapes To Be Played, Interpreted And Used Throughout The Entire Trial, Such Tapes, As A Whole, Being So Untrustworthy, As To Deny Appellant Due Process Of Law.

The tape recordings heretofore mentioned permeated the entire trial. The use by the prosecution of the partial, inaudible and untrustworthy tape recordings wrongfully resulted in conviction. In his opening statement the prosecutor told the jury:

> In this trial you are going to have a unique experience; you are going to have the opportunity to actually hear tape recorded conversations which occurred on two different dates between the defendant . . . and the victim. . . . I urge you to listen very, very carefully to these conversations. I urge you to pick each word out of there as carefully as you can. . . . But listen to the approach of Richard Franklin Fleener as he attempts to, as the government will show you, extort this money from this merchant.

(Rec. Vol. 1, p. 9, 10);

> We're going to hear a conversation for approximately thirty minutes, which occurred between Mr. Mahban and Mr. Fleener. . . . He tells them he wants a thousand dollars. Again my words. You will hear the specific words on the tape. . . . You will hear the specific words on the tape. Additionally, listen very carefully to this. The tape runs out after approximately thirty minutes, for reasons you'll hear from Mr. Mahban. You are going to hear . . . he obtained from Mr. Mahban $200 cash, acting under color of his office, under color of official right, to assist, that is, the money, you will hear, was obtained to assist Mr. Mahban in certain ways, . . .

(Rec. Vol. 1, p. 11);

> . . . that under the strict control of the Federal Bureau of Investigation, that he (Mahban) willfully and consensually wore a transmitting device. . . . You are going to have an opportunity to actually hear a rather lengthy conversation, I think it's approximately fifty minutes that occurred between Mr. Fleener and Mr. Mahban, generally the same subjects again, but I urge you, please listen very closely to that tape again. . . . You are

> going to hear that Mr. Fleener assures Mr. Mahban the minute that he hears he is interested in a new business venture, that he, Mr. Fleener, is going to help him in this business venture, and that he dare not act without his assistance, at least that is the clear implication . . .

(Rec. Vol. 1, p. 12);

> You are going to have the opportunity, in addition to the tape recording and the conversations on them, which I again urge you to listen to carefully, . . .

(Rec. Vol. 1, p. 14). The opening statement of the government consisted of ten pages of the record (Rec. Vol. 1, p. 4-14). It is readily discernible how vital the tape recordings were to the prosecution's case. The government played unidentified portions of the tapes to the jury *thirty-nine separate times* during the trial which commenced on March 13, 1978, at 10:40 a.m. and ended at 2:30 p.m. on March 15, 1978. (Rec. Vol. 1, p. 3 and Vol. 2, p. 444) Concluding argument by the prosecution emphasized, and replayed, portions of the tapes. In short the government's case *was* the tapes, yet the record shows that the tapes were so unreliable that they should not even have been mentioned.

The first witness called by the government was William A. Scobie, a special agent with the FBI. He testified that his particular responsibility was to place on Mahban a tape recorder, transmitter, and microphone owned by the FBI "so that his conversation and any other person who talked to him would be recorded and would be also received by the transmitter and transmitted to other receivers that would be in the same frequency." He testified that he could hear what was being said on his

receiver between appellant and Mahban.[15] (Rec. Vol. 1, p. 25, 26) but he gave no testimony as to what he heard.

The next witness, Thomas R. Parker, a special agent for the FBI, said that he first met Mahban on November 21, 1977. At that time Mahban gave Parker the tape recording of the conversation which Mahban had with appellant on November 18 (Government's Trial Exhibit No. 1). Parker put his initials on this cassette tape and turned it over to special agent T'Kindt. Parker also removed a cassette tape from Mahban after the arrest of appellant on November 21, 1977. (Government's Exhibit No. 5). Government's Exhibit No. 1 and No. 5 were given by Parker to T'Kindt. (Rec. Vol. 1, p. 28-38)

Special agent T'Kindt testified that he was given government's Exhibit No. 1, the small cassette tape, and that he placed it on a recording device, and made two copies of it. The original tape was thereafter locked in an exhibit room. He identified government's Exhibit No. 3 as a written transcript that he had made from the tape recording. He also made a written transcript of Exhibit No. 5 identified as government's Exhibit No. 7. He also made two duplicate tapes, which were on larger cassette recordings "because they are easier to work with instead of trying to use a small tape cassette and this small recording." The two duplicate tapes were identified as Exhibits No. 8-A and No. 8-B. Exhibit No. 8-A was a duplicate copy of government's Exhibit No. 1, and

15. The fact that Scobie did not offer testimony of the content of the conversation indicates that it was not of sufficient clarity for him to risk sworn affirmation of what was said. This stands as further condemnation of the quality of the tapes.

Exhibit No. 8-B was a duplicate copy of government's Exhibit No. 5.

As to the difficulty of transcribing from the duplicate tapes (not the original, or alleged original tapes), witness T'Kindt testified as follows:

> Q: Now with respect to each of the two transcripts you have before you, would you describe the steps you went through in an effort to prepare these two transcripts?
> A: Yes, sir. I placed one of these recording copies on a cassette player and listened to it with a set of earphones. *And I went over and over the tapes until I got the best copy that I could get and went over the tapes approximately six times.*
> Q: Did you go over the tapes with Mr. Mahban?
> A: Yes, sir, I did.
> Q: And did that assist you in your preparation of the two transcripts that you are telling us about?
> A: Yes.

With respect to the smaller tape, government's Exhibit No. 1, he stated as follows:

> Q: Do you know how long, or approximately how long the transcription is on that tape?
> A: I could only guess and say its five minutes.
> Q: We don't want you to guess.
> A: Well, I would say five minutes.
> Q: Do you know?
> A: I don't know specifically.
> Q: Again, sir, how many times did you go over the transcripts in an effort to correct them and make them accurate?
> A: *A minimum number of six times from beginning to end.*

(Rec. Vol. 1, p. 42, 43);

T'Kindt further stated that in preparing the transcripts he "played the tape on a player and listened to what you heard and then try to write it down." He made rough pencil copies, then had them typed and again listened to the tapes and made changes on the tapes and this continued "until I finally got a final copy." The witness then stated (at p. 46, 47 of Vol. 1) "Well, Mr. Mahban, after this was done, we sat down, and there were some parts that were unclear to me and I had him listen to it, of his own voice, and to tell me if what I thought that I had written down was correct in his opinion. He said it was." This witness's final appraisal of the transcripts was that they were "not perfect" and where unintelligible the transcripts were so marked in a number of places. (Rec. Vol. 1, p. 47, 48)

Thus, the record not only shows the unreliability of the tapes, but also shows lack of predicate for the admission of the recordings (assuming arguendo that the sound was audible and trustworthy). The only government witnesses testifying to the predicate were Scobie, Parker and T'Kindt. Mahban only identified the cassette (Government Exhibit No. 1) which he had in his possession for a couple of days prior to turning it over to the FBI.

The burden is on the government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of tape recordings. As stated in *United States v. Starks,* 515 F.2d 112, 121 (3d Cir. 1975) the weight of authority commands that before a sound recording is admitted into evidence, a foundation must be established by showing the following facts: (1) that the recording device was capable of taking

the conversation offered in evidence, (2) that the operator of the device was competent to operate it, (3) that the recording is authentic and correct, (4) that changes, deletions or additions have not been made in the recording, (5) that the recording has been preserved in a manner that is shown to the court, (6) that the speakers are identified, (7) that the conversation was made voluntarily and in good faith, without any kind of inducement. The trial court does not have unbridled discretion to disregard the problems inherent in the use of such evidence. The government has failed to meet its burden to establish a predicate and foundation for the admission of the tape recording. It is apparent from the record that the device was not capable of accurately recording the conversation and that the operator was not competent to operate it. Great portions of the tape recordings were inaudible and untrustworthy and the speakers were not identified.

The direct examination of Mahban (Rec. Vol. 1, p. 52-117) reveals that the tapes constituted the basis of his testimony. The unreliability of the tapes tainted all of his testimony, which was, for the most part, a vain attempt to explain, clarify, identify, interpret and translate the unintelligible sounds on the tapes.

The manner of the use of the tapes, and the fact that the record is devoid of any indication of the portions of the tapes that were played, is illustrated by the following excerpt from the record:

> MR. ANDERSON: Your Honor, I would use Mr. Smith of the FBI to run the tape recorder, and we propose to play exhibit No. 8-A, identified as the November 18, 1977 conversation. Mr. Smith, would you commence the playing of the—(The tape was played.)
>
> MR. ANDERSON: Now stop the tape please.
>
> Q: At this point, are you still talking to Mr. Fleener?
>
> A: *No. I was in the shop, I told Mr. Fleener wait outside, I had some customer. . . .*
>
> THE COURT: *What page are you on in the transcript at this point?* [The Court referred to the transcript, even though it had been excluded from evidence.]
>
> MR. ANDERSON: I believe we are at page five, your Honor. *(The tape was played.)*

(Rec. Vol. 1, p. 74-77).

There are many such examples in the record. The highly prejudicial effect of the use of the tapes, their total unreliability, and the fact that the court realized that the tape recordings were not trustworthy, is shown by the following quotations from the record:

> Q: Where are you now, sir, where this conversation is being recorded, where were you?
>
> A: We were at the coffee shop at the MGM Hotel.
>
> THE COURT: Counsel come to the bench with reporter. (The following proceedings were held at the bench:)
>
> THE COURT: I've been trying my best to follow this recording, this tape with the transcript, both the first one and so far with this one. With the first one I had extreme difficulty trying to pick places where the transcript picked up audible conversation, and it was because there was a lot of music in the background, and the accent of this witness is of no help

to us either. And it's starting out the same thing with this transcript, and I have grave doubt at this moment whether I'm going to permit this jury to follow along with the written transcript, because there's too much danger of the transcript supplying something that the jurors may not be able to hear for themselves. Therefore, as against the possibility that I may later refuse to let the transcript be used by the jurors, I'm going to permit you, Mr. Anderson, to make such use as you desire to, going through this transcript, this tape, of interrupting as you have in the past and having the witness tell us what it was that happened at that time. That seems to be the only manner of interpretation of the terrible reception that we seem to be getting on the tape, that is fair for this jury. *It would be prejudicial to the defendant for me to allow this tape to go to the jury on the basis of the clarity of the tape that I've heard so far. It may be that it may improve in the future,* but I wanted to let you know my feelings on it at this point so that you may make such interruptions as you care to, with this witness, to try to have him tell us what is happening at a certain given point.

(Rec. Vol. 1, p. 82-84);

The following is in the same vein: (Mahban—Direct) (Rec. Vol. 1, p. 88-91)

Q: BY MR. ANDERSON: Do you know what is happening there?

A: No.

Q: You didn't turn it off or anything?

A: No.

MR. ANDERSON: May we turn the tape over, your Honor?

THE COURT: Counsel come to the bench for a moment, please.

(The following proceedings were held at the bench:)

THE COURT: Because I have almost—as a matter of fact, *I have decided against letting the jurors see these transcripts,* . . . so that it will let them do the best they can for getting as much as they can out of the tape as they hear it. We may have to play the whole two of them over again. . . . (Rec. Vol. 1, p. 88)

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen of the jury, you have heard . . . witness, went over the tapes as much as six times and made notes from the tapes as best he could, and eventually made a transcript. And I have a copy of that transcript, and the lawyers have a copy of that transcript. And it is a question whether you should also be given a copy of that transcript. *I have come to the conclusion that there are so many distractions in the tape, . . . and with the lack of foundation that I have, that we have as near a perfect transcript as we can, I don't want to prejudice the defendant by letting you have a copy of this transcript to follow along, because it may be supplying you with something that you should not have.* And what I must impress upon you is that your task is going to be to *listen as closely as you can to the tape as it is being played, and as I know that you have been doing because I've been watching you,* so that you can get as much as you can of the conversation.

This tape is attempting to record a conversation . . . , *there are lapses in it that you just can't get. And that is why I have permitted Mr. Anderson, from time to time, to stop the playing of the tape and to ask*

> *the witness what was said at that particular juncture. This is far from a perfect way of communicating all that was said in these two conversations to you as jurors.* And it is *important that you get as much evidence as you can from a listening to the tape,* because I, for legal reasons, can not send this into you as you deliberate or let you have it now as the tape is being played.
>
> *So, along with the help that this witness will be able to give us in telling us at different junctures, in it what was said at that time on a certain subject, . . .*
>
> (*The tape was played.*) (Rec. Vol. 1, p. 89)

This vividly points out that the tapes were wholly unreliable and untrustworthy and that there was no foundation laid for their admission, a fact recognized by the Trial Court. The trial judge even stated that the playing of the tapes was prejudicial to the defendant, but allowed them to be played. Contradictorily, the court said that the transcripts were the best that could be obtained, but instructed the jury that they were unreliable and so would not be made available to the jury.

At this point in the trial "the horse was out of the barn". The tapes had already been utilized by the government in their opening statements and portions had been played numerous times. The witness Mahban had already been permitted to give his interpretation of what he thought the tapes contained and the court and government counsel continued to use the tapes and the written transcript in the manner indicated by the excerpts from the record.

To compound the error and prejudice, the prosecution, in arguing the case to the jury, repeatedly made reference to the tapes and played parts of them, over strenuous defense objections. What was actually played before the

jury is not reflected in this record for appellate counsel or this Court. It is certainly conceivable that the portions of the tapes played during argument were different from the portions played during the examination of Mahban, and thus injected matters outside the record.

Defendant objected to the interpretation by Mahban as to the conversations on the tape on the ground that it invaded the province of the jury (Rec. Vol. 1, p. 80).[16] After both prosecution and defense rested defendant's trial counsel made further objections to the admission of the tapes and moved to strike on numerous legal and constitutional grounds. (Rec. Vol. 2, p. 372-373).

Ordinarily the admissibility of taped conversations rests within the sound discretion of the trial judge. Each case is determined on its peculiar set of facts. *United States v. Frazier,* 479 F.2d 983, 985 (2d Cir. 1973). However, the trial court does not have unbridled discretion to disregard the problems inherent in the use of tape recording evidence during trial. See *United States v. Starks,* 515 F.2d 112, 121 (3d Cir. 1975) (reversed because of the admission of tape recordings). In *United States v. Knohl,* 379 F.2d 427, 440 (2d Cir. 1967), *cert. denied,* 389 U.S. 973, the court stated:

> . . . that tape recordings are susceptible to alteration and *that they often have a persuasive, sometimes a dramatic, impact on a jury.* It is therefore incumbent on the government to produce clear and convincing evidence of *authenticity and accuracy as a founda-*

16. The pertinence of this objection is illustrated at Rec. Vol. 1, p. 92. When asked about a particular part of the tape, Mahban said "I couldn't hear the tape myself". The portion of the tape was then played over for Mahban a total of three additional times before Mahban would venture an opinion as to the subject being discussed.

> *tion for the admission of such recording;* and where the Court accepts them as authentic and accurate *but the evidence is conflicting on these points, it must caution the jury to scrutinize the evidence with care.*

The correct procedure to be followed prior to the admission of tape recordings or the use of written transcripts is for an *in camera* inspection and playing of the tapes and a hearing of objections thereon. This procedure has been approved and recommended; to do otherwise has been held to be improper by numerous circuit courts. *Gorin v. United States,* 313 F.2d 641,, 651-62 (1st Cir. 1963), *cert. denied,* 379 U.S. 971; *Todisco v. United States,* 298 F.2d 208, 211 (9th Cir. 1961), *cert. denied,* 368 U.S. 989; *United States v. Bryant,* 480 F.2d 785, 789 (2d Cir. 1973); *United States v. Carson,* 464 F.2d 424, 437 (2d Cir. 1972).

Definitive and specific instructions should be given in the court's charge to the jury as to the weight to be given the tape recordings, and instructions admonishing the jury to carefully scrutinize the evidence preserved on the tapes. *United States v. Carson,* 464 F.2d 424, 437 (2d Cir. 1972); *United States v. John,* 508 F.2d 1134, 1141 (8th Cir. 1975); *United States v. Kirk,* 534 F.2d 1262 (8th Cir. 1976).

Where tape recordings are inaudible and a substantial part thereof is unintelligible, the court should preclude the playing of the tapes before the jury unless and until the party offering them prepares an accurate written transcript of the tape recordings. In *United States v. Frazier,* 479 F.2d 983, 985 (2d Cir. 1973), the court held an *in camera* inspection and refused the offering

party the right to use the tapes before the jury. The court stated at page 985:

> There is an obvious danger when a recording is substantially unintelligible that the part that can be heard may leave a misleading impression of the entire conversation. . . . Moreover, the danger of unreliability of a partly inaudible recording is exacerbated *by the substantial impact it may have on the jury.*[17]

Also, see *United States v. Gerry,* 515 F.2d 130 (2d Cir. 1975).

The Court of Appeals for the Ninth Circuit has announced that it expects the trial court to proceed with abundant caution respecting the use of tape recordings. The court announced, at least by strong implication, that tape recordings should be so audible and intelligible that the Court Reporter can transcribe into the record the tapes or parts thereof that are placed in open court. In *United States v. Carlson,* 423 F.2d 431, 440 (9th Cir. 1970), *cert. denied,* 400 U.S. 847, the court stated:

> After listening to the tape, the trial court . . . *permitted the tape to be played once to the jury in the courtroom. Neither the tape nor a transcript of it was permitted in the jury room.* . . . The government concedes that the tape was only partially audible. *The Court Reporter, however, was able to understand and transcribe for the record . . . a substantial part of it.*

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17. This observation is particularly applicable to the present case. The effect is the same as though incriminating portions of a document had been admitted out of context without admitting exculpatory portions which explain the portions admitted. In this case it is possible—in fact, probable—that the inaudible portions provide an explanation entirely consistent with Mr. Fleener's defense.

Portions of tape recordings, the content and context of which are utterly unknown to appellate counsel, were played before the jury on thirty-seven different occasions (two additional times during argument). The Court Reporter was unable to understand and transcribe for the record any part of the tapes so played and emphasized by the prosecution. The failure of the Court Reporter to transcribe this evidence demonstrates how inaudible, unintelligible, and untrustworthy the tapes were. Of course, appellant is deprived of a record on appeal in this respect, a point covered by another portion of this application.

If the unintelligible portions of the tape recordings are so substantial as to render the recordings as a whole untrustworthy, or if the parts audible are without evidentiary value, or if the inaudible parts are so substantial as to make the rest more misleading than helpful, the tape recordings should be excluded. *Monroe v. United States,* 234 F.2d 49, 55 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 873; *United States v. Bryant,* 480 F.2d 785, 790 (2d Cir. 1973); *Gorin v. United States, supra.* Further, even assuming some parts of the tapes are relevant, the same should have been excluded because the probative value of the tapes as used throughout the trial of this case was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and tendency to mislead the jury. See Rule 403, *Federal Rules of Evidence.*

The inadequacy of predicate and foundation could not have been rectified at the trial, nor could the tape recording evidence have been corrected or cured in any manner. Failure to make additional objections by trial

counsel does not preclude raising this matter on appeal. *United States v. Fuentes,* 563 F.2d 527 (2d Cir. 1977); Rule 52(b), *F.R. Crim. P.*

It is submitted that the trial court did not follow the rules formulated in the cited cases. An *in camera* audition of the tapes was not held. The Court did not first hear the tapes out of the presence and hearing of the jury, did not premise the use of the tapes on an accurate transcript of the recordings and did not establish a foundation and predicate for the introduction of the tapes or the duplicates. But the trial court permitted the witness Mahban to bolster his testimony by testifying to "what the tapes were saying". The Court did not give requested cautionary instructions about the use of the tapes to the jury, but used and commented on an unreliable written transcript of the tapes, and permitted the tape recordings to permeate the entire trial. The entire manner of handling the tapes was so highly prejudicial that Defendant was denied a fair trial, due process of law, and effective assistance of counsel, all guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

4. The Failure Of The Trial Court To Require That A Record Be Made Of The Portions Of The Tapes Played In Open Court, And Three Bench Conferences Denied Defendant Adequate Appellate Review And Effective Assistance Of Counsel on Appeal.

It is settled that a defendant convicted in a United States District Court has a right of appeal, "that is, a defendant has a right to have his conviction reviewed by a

Court of Appeals and need not petition that court for an exercise of its discretion to allow him to bring the case before the court." *Coppedge v. United States,* 369 U.S. 443 (1962).

The right to appeal has been held to include the right to assistance of counsel, and if the defendant is unable to afford an attorney, one must be appointed to represent him. *Douglas v. People of the State of California,* 372 U.S. 353 (1963). Effective assistance of counsel on appeal has been held to require the provision of complete transcripts of the proceedings below [*Entsminger v. State of Iowa,* 386 U.S. 748 (1967)] so that, based on an examination of the complete record, appellate counsel can act in the role of "an active advocate in behalf of his client, as opposed to that of *amicus curiae.*" *Anders v. State of California,* 386 U.S. 743, 744 (1967).

In this case, defendant's trial counsel withdrew after the trial. Appellate counsel became attorneys of record after the trial and prior to sentencing. Although the trial was held in Las Vegas, Nevada, the formal sentencing occurred at Los Angeles, California, on April 17, 1978. At that time, defendant's appellate counsel advised the court of the filing of notification of the designation of the record and notice of appeal. The following statements were made:

> MR. McDONALD: Of course, we are requesting that the entire record of all proceedings, actually, we are not designating any segment of it.
>
> THE COURT: I think that very properly the entire record ought to be before the appellate court in this case.

Rec. Vol. 2, pp. 457-58. The written designation of record to be included on appeal was filed on April 17, 1978, and states that the appellant "respectfully requests the Court Reporter to prepare a transcript of all of the evidence adduced during the trial of this action and of all proceedings had including but not limited to hearing on pretrial motions, jury selection, trial, and post-trial and sentencing." (Rec. Vol. 3, p. 1).

The record is far from complete. On thirty-seven separate occasions during the testimony, a tape recording machine was played in open court for various periods of time, the length of which are not indicated in any way. The record simply says "(The tape was played.)" The record is silent as to what the jury may or may not have heard, who was speaking, the length of time that the tape played, or anthing else that transpired. Twice during the closing arguments of the prosecution, the tape recorder was played, and the Court Reporter again failed to make any record as to what was said or what occurred.

In addition, on three separate occasions during the trial, the Court Reporter's transcript indicates that a conference was held at the bench, but the record is silent as to who attended the bench conferences or what was said or done during the conferences.

The effect of these omissions clearly was to deny the defendant adequate review and effective assistance of counsel on appeal. The Court Reporter on thirty-seven separate occasions during the taking of the testimony, and two separate occasions during the closing arguments, failed to comply with the mandate of the Court Reporter's Act requiring all proceedings in open court to be recorded, but instead, became oblivious to the fact that the

prosecution was playing a tape machine for the jury to hear. The tapes supposedly contained conversations to which the defendant was a party. Perhaps the poor quality of the tapes is responsible for the court reporter's inactions, but the record would have been aided by an indication of the length of time each portion of the tape lasted, and a notation that the tapes were inaudible. The record made available to appellate counsel does not reveal the nature of any of the alleged conversations, the identity of the parties speaking, the actual words alleged to have been said, the duration of the conversations, or anything else. Appellate counsel can not tell whether a particular portion of a tape might have contained a statement inadmissible for legal reasons, or whether there might have been valid legal objections to certain portions of the tapes. There is no way to ascertain whether the tapes were inconsistent with Mahban's explanations. There is no way to tell if exculpatory portions of the tapes were excluded. Appellate counsel are totally unable to determine if defendants right were violated, or whether defendant received adequate and effective assistance of trial counsel.

The procedure employed by the trial court and the Court Reporter have been specifically condemned. "To avoid danger of reversal *for an inadequate record* and possible prejudice, some means should be used *to identify clearly those portions of the tapes played at trial.*" *United States v. Jones,* 540 F.2d 465 (10th Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977). Even if the tape recordings were themselves properly admitted, which is denied, neither appellate counsel nor this Honorable Court will ever know what particular portions of those tapes were played for and heard by the jury that decided this case. This error requires reversal.

The failure to report the bench conferences compounds the error. The first decision dealing with the failure of the Court Reporter's transcript to contain conferences held at the bench was that of the Ninth Circuit in *United States v. Williams,* 455 F.2d 361 (9th Cir. 1972). The conviction was affirmed, but the Ninth Circuit first required the record to be supplemented with the reporter's transcript of the bench conferences, which then showed clearly that nothing constituting error had transpired during the conferences.

In *United States v. McGarrity,* 559 F.2d 1386 (5th Cir. 1977), the record on appeal contained an entry reading "(discussion at the bench off the record.)" The Fifth Circuit noted that it could "not endorse the failure of the record to contain a verbatim report of all proceedings in open court," as mandated by the Court Reporter's Act, but was nevertheless able to affirm the conviction on the basis that the portion of the reporter's transcript immediately following the bench conference notation clearly and unmistakeably indicated exactly what had happened during the bench conference (i.e., that the prosecution and defense had stipulated that the prosecution need not call a particular government witness.) Under these circumstances, the Fifth Circuit felt there was "no other reasonable conclusion to draw from the record as a whole and there being nothing to indicate that any prejudice resulted to the defendant or to the ability of this court adequately to review the proceedings in the trial court. . . ." 559 F.2d at 1389. It is thus the position of the Fifth Circuit that on rare occasions, "there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of

the proceedings." *United States v. Selva,* 559 F.2d 1303, 1306 (5th Cir. 1977).

Unless this can be done, the error warrants reversal. In reversing a conviction in which the record revealed unreported bench conferences, the Fifth Circuit observed that the Court Reporter's Act requiring the recording of all proceedings held in open court in criminal cases "is mandatory," and is "*not* to be overridden by local practice." *United States v. Brumley,* 560 F.2d 1268, 1280 (5th Cir. 1977). During an unreported bench conference, the trial court might have instructed trial counsel not to make further examination of a particular witness as to a particular matter, might have instructed trial counsel not to call a particular witness, or might even have made a derogatory comment about defendant or his counsel, overheard by the jury.

Since a bench conference is recognized to be an important part of the proceedings held in open court in a criminal trial, it is manifest that the failure of the record on appeal to contain the three separate bench conferences in this case deprived defendant of effective right of appeal and assistance of counsel on appeal. The three bench conferences are noted at pages 203 and 219 of Vol. 1 of the record, and page 374 of Vol. 2 of the record. The record is silent as to what transpired, or who was present at the bench, or whether the conference was audible to the jury. Only in the case of the last conference is there any indication whatsoever as to what may have been the general subject matter of the conference.

The cumulative effect of these omissions certainly requires reversal. The Court Reporter's statute is "mandatory rather than permissive." The District of Columbia Circuit reversed a case in which the transcript was complete but for one instruction given to the jury during deliberations.

> "In light of the clear language of the statutory mandate, the ease with which its requirements can be satisfied, and the crucial importance of the transcript to meaningful appellate review, we think that such exceptions should be narrowly construed. . . . There can be little doubt that the absence of a complete and accurate transcript impairs the ability of appellate counsel to protect his client's basic rights. . . . The problem is greatly exacerbated when, as here, the attorney representing the appellant is different from the counsel who represented him at trial. . . . The difficulties inflicted upon appellant's counsel by an inadequate transcript of the trial proceedings are necessarily shared by the reviewing court. It is difficult enough in normal circumstances to appraise the propriety of the trial court's various actions on the basis of a cold printed record; when that record is [incomplete], our review is turned into an exercise in creative imagination."

United States v. Workcuff, 422 F.2d 700 (D.C. Cir. 1970). In *United States v. Upshaw,* 448 F.2d 1218 (5th Cir. 1971), the court reversed for the reason that the record contained the closing arguments of the prosecution, but not the closing argument of the defense trial counsel.

> Where new counsel is appointed for appeal, he may not be able to discharge his duty to seek out plain errors not brought to the attention of the court unless he can read the entire transcript. Otherwise, the right to assign plain error may become il-

> lusory. . . . And, of course, new appellate counsel may be unable to assign as error or present effectively matters which were objected to, and the objections overruled, except to the extent the transcript informs him of them and supports his presentation of them. . . . However, the language of the Court Reporter Act is clear, and its requirements are mandatory and may not be overridden by local practice. Since compliance with the act is not difficult, and the transcript is of crucial importance to the defendant (and to the appellate court for meaningful review), exceptions should be few and narrowly construed.

448 F.2d at 1223-24.

In recently reversing a case for failure of the record to contain the closing arguments, the Fifth Circuit observed that two rules have evolved with respect to the effect of a failure to comply with the Court Reporter's Act.

> The first holds that failure to comply with the act is not error per se and will not work a reversal absent a specific showing of prejudice—i.e., appellant must show that failure to record and preserve the specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal. [citing cases] The government urges upon us this body of law as controlling our decision here. We disagree. An examination of the second body of case law reveals that a different rule obtains in cases involving new counsel on appeal. When, as here, a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal. [citing cases] The wisdom of this rule is apparent. When a defendant

> is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. . . . But when a defendant is represented on appeal by counsel not involved at trial, counsel can not reasonably be expected to show specific prejudice. . . . In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to notice plain errors or defects, . . . and render merely technical his right to appeal.

United States v. Selva, 559 F.2d 1303 (5th Cir. 1977). In another recent case dealing with a situation where the record was incomplete as to the closing arguments, the Ninth Circuit has specifically held that in this circuit the Court Reporters are required to make a record of

> the voir dire examination of jurors, the opening statements of counsel, and the closing arguments, as well as any bench conferences when requested by the court or counsel. These matters are as much a part of the proceedings in criminal cases as are the testimony of witnesses, the rulings of the court, the motions and objections of counsel, etc. In short, anything that transpires in *open court,* with the possible exception of the reading of a deposition, should be recorded by the reporter. Local practice can not alter the statute.

United States v. Piascik, 559 F.2d 545 (9th Cir. 1977). In *Piascik,* the Ninth Circuit was able to affirm the conviction despite the absence of the closing arguments, on the basis that the defendant had in open court, in a portion of the proceedings which was transcribed for appeal, specifically waived the reporting of the closing

arguments. The Ninth Circuit noted that the requirements of the Court Reporter's statute "are mandatory according to several circuits and, we believe, from a fair reading of *Brown v. United States, supra,* they are mandatory in this circuit." 559 F.2d at 548. Under the peculiar circumstances of this case, where the record on appeal is woefully inadequate in numerous respects significantly affecting appellant's rights, and appellant is represented by new counsel on appeal, reversal is required.

5. The Defendant Was Convicted Of An Offense Not Charged In The Indictment, On The Basis Of Evidence Extraneous To The Indictment.

In two respects, defendant was convicted of an offense for which he did not stand charged by indictment. Evidence elicited and charged upon by the court so broadened and in effect amended the indictment as to include an additional crime not described in the indictment.

First, the indictment charged that appellant interfered with interstate commerce by extorting money from Mahban to lower or not raise his personal property tax assessments, while the proof and court's charge enlarged and broadened this alleged crime by permitting proof and instructions concerning a second and different interstate commerce interference, that of obtaining some sort of preferential treatment for Mahban with the Internal Revenue Service.

Second, the indictment charged that appellant burdened interstate commerce by extortion under the color of his official authority as a Clark County, Nevada, Deputy Tax Assessor, and this charge was enlarged and

broadened and amended by evidence and jury instructions relating to extortion by threats and fear.

Concerning the first amendment of the indictment, above referred to, it is noted that the indictment is absolutely silent as to any alleged effect upon commerce caused by the appellant by intervention, real or threatened, with the Internal Revenue Service. The sole act charged affecting commerce is the claimed threat of manipulating, by lowering or raising, Mahban's "property tax assessment" or "personal property tax assessment" under color of appellant's authority as a Clark County, Nevada, tax official. No reference, direct or indirect, is made in the indictment to any effect on commerce claimed to be caused by appellant in manipulating Mahban's Federal Income Taxes or any other taxes under the jurisdiction of the Internal Revenue Service.

Yet, the government attorney alluded to I.R.S. tampering in his opening statement (Rec. Vol. 1, p. 11, 12), the testimony concerning the appellant's alleged I.R.S. tampering or promises was admitted (Rec. Vol. 1, p. 55, l. 25; p. 56, l. 1; p. 57, l. 20-25; p. 58, l. 1-3; p. 66, l. 2-8; p. 77, l. 10-25; p. 78, l. 1-9; p. 87, l. 22-25; p. 88, l. 1-3; p. 92, l. 2-10; p. 116, l. 10-25; p. 117, l. 10-25; p. 118, l. 1-2), and the court charged upon this phase of the alleged obstruction of commerce (Rec. Vol. 2, p. 431, l. 10-17).

In argument to the jury, the government's attorney stated that appellant "guaranteed I.R.S. would not be coming" (Rec. Vol. 2, p. 384, l. 23) and made numerous other arguments respecting appellant's alleged I.R.S. connections or promises. (Rec. Vol. 2, p. 392, l. 17-20; p. 393, l. 6-8; p. 418, l. 19-23).

In this connection, it is further noted that to defendant's motion for bill of particulars in which defendant requested specification as to what acts were done by the defendant to induce the alleged victim to pay any sums of money to the defendant, setting forth dates, times, and places where such acts were performed, the government responded that the indictment described the conduct of the defendant with sufficient particularity and further specifications by means of bill of particulars was inappropriate. (Rec. Vol. 3, p. 82). Thus, there was no attempt by response to the bill of particulars to broaden or particularize any of the allegations of the indictment.

It is obvious that one of the crimes for which the government was attempting to convict defendant was the crime of obstructing commerce by threatening to manipulate Mahban's Federal Income Taxes; the record is permeated with the government's efforts in this regard. Yet, this is *not* the crime for which he was indicted. Nowhere in the indictment is there any mention or allusion to I.R.S., Internal Revenue Service, Federal Income or any other federal taxes. The only crime charged in the indictment, the sole burden on interstate commerce claimed to have occurred by reason of appellant's activities, is another and different Hobbs Act violation, another and different means and method of burdening commerce. This situation has resulted in what has been plainly held by the Supreme Court of the United States in *Stirone v. United States,* 361 U.S. 212 (1960) to be an impermissible and unconstitutional amendment of the indictment, and a conviction for an offense not charged in the indictment.

In *Stirone,* the defendant was "indicted and convicted in a federal court for unlawfully interfering with interstate

commerce in violation of the Hobbs Act." The indictment charged only one method of interference with commerce —that of extortion induced by fear of loss of a contract to supply ready-mixed concrete, the sand for which moved into Pennsylvania from out of state. The government offered evidence supporting this charge, but additionally proved that the extortion would affect interstate commerce in another manner, not charged in the indictment, that is that the concrete was to be used to build a Pennsylvania steel mill which would ship steel out of Pennsylvania. Further, the trial court in its charge, instructed that conviction could rest on a finding of either of the two claimed interferences with commerce. In this, Justice Black for the Supreme Court held the trial court erred, stating:

> [W]e agree with the dissenting judges of the Court of Appeals that it was error to submit that question to the jury and that the error can not be dismissed as merely an insignificant variance between allegation and proof and thus harmless error as in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. The crime charged here is a felony and the Fifth Amendment requires that prosecution be begun by indictment.
>
> Ever since Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849, was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.

Stirone v. United States, 361 U.S. 215, 216 (1960).

The Supreme Court in *Stirone* reasoned that since the Grand Jury was satisfied to charge that Stirone's conduct

interfered with interstate commerce of sand, the trial court could not know whether the Grand Jury would have so charged respecting steel shipments from a plant built with the sand.

> And it can not be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

361 U.S. at 217.

Further, Justice Black held that:

> [T]he addition charging interference with steel exports here is neither trivial, useless, nor innocuous. While there was a . . . variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury.

361 U.S. at 217. Justice Black concluded (361 U.S. 218) that: "[W]hen only one particular kind of commerce is charged to have been burdened a conviction *must* rest on that charge and not another." Any deviation, Justice Black reasoned, resulted in a situation where it would be impossible to know whether the defendant was convicted on the basis of the charge the Grand Jury had made against him, or on the basis of some other crime covered in the evidence and the trial court's instructions to the jury. "This was fatal error." 361 U.S. at 219.

The same reasoning applies with equal force to the second situation above referred to whereby the indictment charged the defendant with extortion solely by reason of

the color of his office, and the proof, charge to the jury, arguments of the government all enlarged, broadened, and amended these charges in the indictment by adding thereto claims that commerce was interfered with by appellant by means of threats and fear. Threats and fear are nowhere mentioned in the indictment as a part of the crime for which appellant is on trial, yet, he was convicted of that crime.

Failure to object is not material under the circumstances here where the scope of the indictment goes to the existence of the trial court's subject matter jurisdiction. The defect here complained of is one which can not be waived by the appellant even by agreement. *Crosby v. United States,* 339 F.2d 743 (D.C. Cir. 1964).

In a recent case, the Ninth Circuit, on the authority of *Stirone v. United States,* 361 U.S. 212 (1960), reversed a conviction in a situation quite similar to the matter here before the court. Thus, in *Howard v. Daggett,* 526 F.2d 1388 (9th Cir. 1976), defendant was indicted for traveling in interstate commerce to promote prostitution with Lucretia Yvonne South and Dolores Nelson. The evidence showed the defendant had relationships with several women in addition to the two specifically named in the indictment. The jury instructions did not limit jury consideration to the two women named in the indictment, and a note from the jury was responded to by the court by giving a supplemental instruction. "The effect of the supplemental instruction was to permit the jury to convict appellant on the basis of evidence introduced at trial *regarding women other than the two named in the indictment.*" On the authority of *Stirone,* this Honorable Court held: "To allow the jury

to consider the evidence respecting the other alleged prostitutes was to allow the jury to convict of a charge not brought by the Grand Jury. The supplemental instruction constituted an impermissible amendment of the indictment that 'destroyed the defendant's substantial right to be tried on charges presented in an indictment returned by a Grand Jury.' " 526 F.2d at 1390.

It is submitted that appellant here has likewise been denied the right to be tried solely on charges presented in an indictment returned by a Grand Jury.

6. The Indictment Is Duplicitous.

The indictment, in a single count, purports to charge both (1) attempted extortion and, (2) extortion. This renders the indictment fatally duplicitious under Rule 8(a), F.R. Crim. P., which requires that every offense be alleged in a separate count. Wright, *Federal Practice and Procedure,* Criminal, Section 142, at 309 (1969).

The case of *United States v. Starks,* 515 F.2d 112 (3rd Cir. 1975) was a proceeding under the Hobbs Act under an indictment charging the defendants did "unlawfully and willfully *conspire* and *attempt* to obstruct, delay and affect commerce," by extorting money from a tavern proprietor. The trial court refused to dismiss the indictment or to require the government to make an election. In reversing the convictions, the court clearly exposed the vices of duplicity as follows:

> One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him not guilty of one crime or not guilty of both. Conceivably this could prejudice the defendant in protecting himself against double jeopardy. Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or of both. Conceivably this could prejudice the defendant in sentencing and in obtaining appellate review. A third vice of duplicity is that it may prejudice the defendant with respect to evidentiary rulings during the trial, since evidence admissible on one offense might be inadmissible on the other. . . . Finally, there is no way of knowing with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to either.

United States v. Starks, 515 F.2d 116-117.

Further, in *Starks* the court found that the duplicity in that indictment had occurred where the indictment charged that the defendant did "unlawfully and willfully *conspire* and *attempt to obstruct,*"; etc. . . . by extorting money. In explaining this holding the court stated at 515 F.2d 117:

> The Hobbs Act proscribes a number of *separate offenses:*
>
> (1) robbery;
>
> (2) extortion;
>
> (3) attempted robbery or extortion;
>
> (4) conspiracy to commit robbery or extortion;
>
> Each such offense also required the federal jurisdictional element of obstruction, delay or effect on interstate commerce. The indictment charged two such offenses, conspiracy to extort and attempt to extort.

> Since both were improperly charged in a single count the defendant's pretrial motions that the indictment be dismissed or that the government be required to elect should have been granted.

The court in *Starks* unequivocally held that extortion and attempted extortion were two separate offenses. Although in the *Starks* indictment the two separate offenses which were improperly joined were attempted extortion and conspiracy to commit extortion, there can be no difference in principle where, as here, the two separate offenses improperly joined are those of extortion and attempted extortion. The same reasoning as to the vices inherent in such a procedure apply with equal force to both improper joinders.

There is no question about the materiality of the court's holding respecting the duplicitous nature of the indictment in *Starks*. This holding was not dicta as contended by the government in its opposition to appellant's motion to dismiss. (Rec. Vol. 3, p. 75) This is definitely borne out in the retrial of the *Starks* case which reached the United States Supreme Court in *Abney v. United States*, ____U.S.____, 97 S.Ct. 2034 (1977). On page 2038 the Supreme Court in its opinion states:

> On appeal, the United States Courts of Appeals for the Third Circuit reversed petitioners' conviction and ordered a new trial on the ground that the key tape recording had been admitted into evidence without proper authentication. *United States v. Starks*, 515 F.2d 112 (C.A. 3, 1975). The Court of Appeals also agreed with the petitioners' claim that the indictment was duplicitous. *Id.*, at 115-118. However, since the admission of the unauthenticated

> tape recording necessitated a new trial in any event, the court found it necessary to pass on the Government's argument that the indictment's duplicitous nature had been corrected by the trial court's instructions to the jury and was thus harmless. *Id.*, at 118. Nonetheless, it directed the Government to elect between the conspiracy and attempt charges on remand in order to avoid any similar problems at the next trial. *Id.*, at 118, 125.

CONCLUSION

In the instant case, the government convicted this appellant of an offense not charged in the indictment and on an indictment that was fatally duplicitous.

The prosecution as an expedient tool of its trial strategy permeated the entire trial, from opening statement through final argument, with unreliable, inaudible, and untrustworthy tape recordings. The use of these prejudicial tape recordings resulted in appellant's conviction and the denial of his receiving a fair trial and due process of law.

Further, the denial of an appellate record and effective assistance of counsel on appeal, with the other errors set forth herein, have resulted in a manifest miscarriage of justice.

Accordingly, defendant-petitioner respectfully prays that this petition be granted and, that the decision of the Ninth Circuit and the judgment of conviction of the United States District Court for the District of Nevada

be reversed and a decision rendered in petitioner's favor, or in the alternative, that the cause be remanded to the District Court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing brief was this _____ day of _____ 1979, placed in the United States Mail, first class postage prepaid, directed to Mr. Geoffrey Anderson, Attorney in Charge, Las Vegas Strike Force Office, U.S. Department of Justice, P. O. Box 160313, Las Vegas, Nevada 89102, and to Robert J. Erickson, Criminal Division, Dept. of Justice, Room 2155, Washington, D.C. 20530.

CHARLES M. MCDONALD

78-1649

Supreme Court, U. S.
FILED
APR 19 1979
MICHAEL RODAK, JR., CLERK

NO. 78-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Plaintiff-Respondent

v.

RICHARD FRANKLIN FLEENER,
Defendant-Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

NO. CR LV-77-141 RDF (DWW)

(Filed April 17, 1978)

UNITED STATES OF AMERICA

v.

RICHARD FRANKLIN FLEENER

On this 17th day of April, 1978 came the attorney for the government and the defendant appeared in person and by his retained attorney, Charles M. McDonald.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a jury verdict of guilty has been convicted of the offense of Interference with Commerce by Extortion, in violation of Title 18 United States Code, Section 1951 as charged in the one count Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years.

THE COURT ADVISES THE DEFENDANT RE HIS APPEAL RIGHTS:

THE COURT ORDERS defendant's previous bond exonerated and sets bond on appeal at $10,000.00 Appearance bond, with 10% cash deposit:

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID W. WILLIAMS
David W. Williams
United States District Judge.

By: /s/ SYLVIA ROJAS
Sylvia Rojas, Deputy Clerk.

EDWARD W. KRITZMAN, Clerk
Filed April 17, 1978
Los Angeles, California

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 78-1988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD FRANKLIN FLEENER,
Defendant-Appellant.

(Filed March 9, 1979)

O R D E R

Before: MERRILL and KENNEDY, Circuit Judges, and KING, District Judge

The panel in the above case has voted to deny the petition for rehearing. Judge Kennedy has voted to reject the suggestion for rehearing en banc and Judges Merrill and King have recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 78-1988

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD FRANKLIN FLEENER,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada

(Filed January 19, 1979)

MEMORANDUM

Before: MERRILL and KENNEDY, Circuit Judges,
and KING,* District Judge

Defendant-Appellant attacks his jury conviction of unlawfully attempting to obstruct interstate commerce by extorting money and property from a businessman under color of official right, in violation of 18 U.S.C. § 1951. We affirm.

---

* Honorable Samuel P. King, Chief Judge, United States District Court, District of Hawaii, sitting by designation.

Defendant argues that the requisite effect on interstate commerce was not shown, and that the alleged conduct had no relation to his official duties. Inasmuch as the person victimized was an importer of oriental and Persian rugs, tapestries, and gift items, whose inventory came mostly from foreign or out-of-state suppliers, an effect on interstate commerce was adequately supported by the evidence. *United States v. Phillips,* No. 77-1283 (9th Cir. 1978), slip op. at 7, is correctly cited by the government for the proposition that "Only a de minimis effect [on interstate commerce] is necessary . . . and the effect need be only probable or potential, not actual."

Because defendant is said to have told his victim that the service to be performed by defendant would take care of any problems the victim might have with the Internal Revenue Service whereas defendant was only a county deputy tax assessor, defendant questions whether the proof brought his conduct within the phrase "under color of official right." But the service to be performed was an alteration in the appraised value of the victim's inventory, which appraisal was clearly within the ambit of defendant's official duties. Furthermore, it is not necessary under the Hobbs Act that the defendant actually have the power to perform as promised but only that the victim have a reasonable belief in defendant's power to act.

Defendant argues that the indictment was duplicitous, and that he was convicted of an offense not charged in the indictment.

Defendant relies upon *United States v. Starks,* 515 F.2d 112 (3d Cir. 1975) for the first proposition. But as defendant's own brief points out, *Starks* involved an

indictment charging both a conspiracy and an attempt under 18 U.S.C. § 1951. The indictment in this case charges only an attempt, although some details of the attempt are set out, including an allegation that money was actually paid over. The case was tried as an attempt; the judge instructed the jury that "the crime was never completed." Defendant's trial attorney had no difficulty with the language of the indictment in this regard.

Defendant relies upon *Stirone v. United States,* 361 U.S. 212 (1960), for the second proposition. But in *Stirone* the trial judge added a second ground not alleged in the indictment as a basis upon which the jury could find that there had been an effect on interstate commerce. The Hobbs Act is designed to reach "extortion" which is defined by the statute as meaning "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." While the wording of the indictment could have been improved upon, it does state that the money paid over to defendant was "to lower the property tax assessment . . . and to prevent economic loss . . .," although earlier in the indictment the payment was alleged to have been "induced under color of official right." The judge did instruct the jury that the "second element [of the alleged crime] is met if you are satisfied that the defendant attempted to induce the victim's payments in either one of two ways; either fear of economic harm to the victim or under color of official right." There was no objection to these instructions. Defendant was clearly using his official position as a springboard for inducing his victim to part with money (and a rug), and in so doing was letting his victim know what could be done to, as well as for, the victim.

Defendant urges that the trial judge's instructions were biased in favor of the government and deficient in failing to charge on the defendant's theory that the payments received by him were made voluntarily for legal and legitimate consultation services and business advice rendered and to be rendered. This interpretation of the evidence is not a theory of defense but a denial of the government's evidence. Defendant's right to argue innocence was adequately covered by the court's instructions on presumption of innocence and reasonable doubt. Taken as a whole, the instructions were standard fare for this type of case and were not specially designed to favor the government.

Defendant urges error in the manner in which two tape recordings of meetings between defendant and the victim were used at the trial. The only substantial argument put forth in this regard is that the tapes should not have been used because the quality of the recording was so poor as to make it impossible to determine what was being said, yet the jury would be impressed nevertheless. Admittedly, the tapes were not perfect, attempted transcripts of what was on the tapes were not admitted in evidence because the judge thought the written reconstruction was too speculative, the reporter made no effort to record what was being played back off the tapes, and the playing of the tapes was interrupted frequently for interpretive questions and answers while the victim was on the stand. But the tapes did provide some audible probative relevant evidence; the deficiencies in the quality of the tapes was brought to the attention of the jury by the judge; the procedure that was followed was discussed at two bench conferences; there was no objection by defendant's trial counsel.

Finally, defendant urges error because of alleged deficiencies in the record. The record as originally filed did not contain a transcript of the arraignment and plea nor of the voir dire on empanelment of the jury, although a timely request had been made to include these matters. This was an error which has since been corrected.

Three "brief" bench conferences were held without a reporter. It does not appear how defendant was in any way prejudiced by this circumstance. Applying the principles set forth in *United States v. Piascik,* 559 F.2d 545 (9th Cir. 1977), we find no reversible error here.

The reporter did not attempt to record what was coming off the tapes as they were being played. But the tapes themselves were introduced into evidence, the record indicates when the tape was being played, and the discussion during the playing of the tapes clearly indicates what portion of a tape is being discussed. There was no objection to the procedure. We find no violation of 28 U.S.C. § 753(b) here.

The polling of the jury after verdict was conducted by the clerk and reported as follows: "(The jurors were individually polled and each answered 'yes.')." While this is not a "verbatim" recordation, the argument that this alone is a basis for reversal is not supported by the authorities. *See Piascik, supra.*

The conviction and judgment below are AFFIRMED.